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# YOU CAN'T TAKE THE SKY FROM ME: A GRAMSCIAN INTERPRETATION OF THE COMMON HERITAGE OF MANKIND PRINCIPLE IN SPACE LAW

Greg Melchin\*

## ABSTRACT

The common heritage of [hu]mankind (CHM) principle is an element of the Moon Treaty of 1979 that was foreshadowed by the Outer Space Treaty of 1967. However, its precise content and legal implications have been the subject of conflicting interpretations. This paper will apply a Gramscian analysis to the formation of international law. Gramscian theory is a school of neo-Marxist International Relations (IR) theory that focuses upon the ways in which a dominant historic bloc (called the “hegemon”) maintains control over other groups. This paper applies Gramscian theory to the power dynamics in international law in order to gain insight into the current state of the CHM principle as it applies to space resource law.

The CHM principle has had little impact on the development of space law. Although existing space treaties enshrine CHM to varying degrees, the principle is too vague in the 1967 Outer Space Treaty to have had much impact, and no major space powers are parties to the 1979 Moon Treaty. Given the dominance of space travel in the 20<sup>th</sup> century by imperialistic superpowers, any interpretation of the CHM principle is consonant with the preservation of hegemony.

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## INTRODUCTION

The common heritage of [hu]mankind (CHM) principle is an element of the Moon Treaty of 1979, and is foreshadowed<sup>1</sup> in the Outer Space Treaty of 1967. However, despite the principle's decades-old existence, its precise content and legal implications remain subject to conflicting interpretations. This article adopts a Gramscian approach to the formation of international law in order to demystify the reasons for disagreement. Gramscian theory is a school of neo-Marxist International Relations (IR) theory that focuses upon the ways in which a dominant historic bloc (called the **hegemon**) maintains control over other groups. Applying Gramscian theory to the power dynamics in international law provides insight into the current state of the CHM principle as it applies to space resource law.

This article contains three parts: (i) an introduction to Gramscian analysis, (ii) a brief overview of the CHM principle and its development in treaty law, and (iii) a Gramscian analysis of the legal effect of the CHM principle.

### 1. GRAMSCIAN ANALYSIS OF INTERNATIONAL LAW

Given the brutality and eventual disintegration of Eastern Bloc regimes and the dissimilarity between existing, nominally Communist economic systems and anything resembling traditional Marxism, critics may be inclined to view Marxist analysis as a spent force with little relevance to current discourse on international law. Yet neo-Marxist theories of power and control, which have been refined and debated for decades by academics, can offer invaluable insights into the processes of international law. Duncan Kennedy suggests that Gramscian thought is a particularly “palatable” form of Marxism for the theory of international law since it is analytical, rather than prescriptive, and because it is not associated with Soviet Communism.<sup>2</sup> Indeed, one does not have to support traditional Marxist objectives such as a stateless society and the abolition of private property to

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<sup>1</sup> See Section 2.2.1 below.

<sup>2</sup> Duncan Kennedy, “Antonio Gramsci and the Legal System” (1982) 6 *Am Legal Stud F* 32 at 32–33.

accept the utility of a nuanced theory of power to legal scholarship. This is particularly true in the sphere of international law, in which asymmetries of power are most evident. This article applies Gramscian analysis only to determine *lex lata* (law as it exists); examining *lex ferenda* (emerging law) according to Gramscian thought is beyond the paper's limited scope.

## 1.1 Elements of Gramscian Analysis

Antonio Gramsci (1891–1937) was an Italian intellectual and political figure who co-founded the Italian Communist Party. In 1924, Gramsci was imprisoned by the Mussolini government and spent the remainder of his life in prison. Gramscian theory has its origins in his *Prison Notebooks*, which have proven highly influential on Western Marxism, despite their fragmented and sometimes contradictory nature. Two main themes arise from Gramsci's *Notebooks*: (i) a democratic process for Marxist class struggle based on education and the role of intellectuals in public life, and (ii) a theory of hegemony.<sup>3</sup> Although the former has proven highly influential, particularly in the realm of popular education and the field of development studies through its influence on Paulo Freire and others, the theory of hegemony is more relevant to the fields of IR and international law.

### 1.1.1 Hegemony and Consent

While some Marxist theorists focus upon the role of coercion in their analyses of structures of control in society, Gramsci argued that a hegemonic power, or hegemon, maintains its dominance through consent as well as coercion. In a vivid illustration of the nature of power, Gramsci referred to Machiavelli's image of the centaur: half human (social consensus) and half animal (coercion).<sup>4</sup> According to Robert Cox,

To the extent that the consensual aspect of power is in the forefront, hegemony prevails. Coercion is always latent but is only applied in

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<sup>3</sup> Maurice A Finocchiaro, "Antonio Gramsci" in Robert Audi, ed, *The Cambridge Dictionary of Philosophy*, 2d ed (Cambridge: Cambridge University Press, 1999) 353 at 353–354

<sup>4</sup> Antonio Gramsci, *Selections from the Prison Notebooks*, ed & translated by Quentin Hoare & Geoffrey Nowell Smith (New York: International Publishers, 1971) at 169–170.

marginal, deviant cases. Hegemony is enough to ensure conformity of behaviour in most people most of the time.<sup>5</sup>

Due to the fragmented and unsystematic nature of Gramsci's *Notebooks*, the Gramscian school of IR draws upon the reconstruction and interpretation of Gramsci's thought by successive academics and activists. Cox introduced Gramscian thought to the field of IR in the 1980s. In some respects, the Gramscian perspective on international law is similar to the realist perspective, insofar as both reject the positivist model of international law as being based on the rational choices of sovereign and equal states. The Gramscian and realist perspectives both view power dynamics as the drivers of international legal action and generation. However, Gramscian analysis in particular provides a useful vocabulary and analytical framework for discussing subtle applications of power in a voluntary legal system.<sup>6</sup>

Although some contemporary neo-Gramscians contend that it is not states but ideological systems that become hegemonic,<sup>7</sup> Cox maintained that in Gramscian thought the state is "the basic entity in international relations and the place where social conflicts take place."<sup>8</sup> States are prior to and generative of ideological systems through which they aspire to cast their interests in moral, universalistic language. Cox describes hegemony as "not an order in which one state directly exploits others but an order which most other states (or at least those within reach of the hegemony) could find compatible with their interests."<sup>9</sup> Cox characterizes the 1945–1965 period as a time of American hegemony, while the period after 1965 saw the rise of would-be counter-hegemonies in the Eastern and New International Economic Order (NIEO, also known as the Group of 77 or Third World) blocs.<sup>10</sup>

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<sup>5</sup> Robert W Cox, "Gramsci, Hegemony and International Relations: An Essay in Method" (1983) 12:2 *Millennium J Int'l Stud* 162 at 164.

<sup>6</sup> James D Fry, "Legitimacy Push: Towards a Gramscian Approach to International Law" (2008) 13 *UCLA J Int'l L & Foreign Aff* 307 at 312–313.

<sup>7</sup> See Stephen Gill, "Epistemology, Ontology and the 'Italian School'" in Stephen Gill, ed, *Gramsci, Historical Materialism and International Relations* (Cambridge: Cambridge University Press, 1993) 21 at 42.

<sup>8</sup> Cox, *supra* note 5 at 169.

<sup>9</sup> *Ibid* at 170.

<sup>10</sup> *Ibid* at 170–171.

Like realism, Gramscian thought regards a state's compliance with a law not as acceptance of its moral rightness, but as a justifiable choice made in the absence of any real alternative. The lack of alternatives is a circumstance created by the hegemon; James Fry observes that such a situation also constitutes the traditional legal definition of duress.<sup>11</sup>

### 1.1.2 Social Myth and *Trasformismo*

Establishing hegemony involves the development of an ideological system that is universalist in scope. According to Augelli and Murphy,

Idealist philosophy, whether of the right or the left, sees a radical separation between force and consensus, but in the real world these two forms of rule are mutually supportive and often combine in ambiguous ways. Force rarely appears as brute force, nor do the representatives of power justify its use by invoking the interests of the dominant social group or dominant social alliance, even though that must always be the ultimate reason why force is used in the place of rule by consensus. To mask the lack of consensus, the representatives of power always proclaim grand moral principles to justify the use of force.<sup>12</sup>

The “grand moral principles” constitute an element of “social myth,” a term Gramsci appropriated from Georges Sorel. Social myth is a “collective subjectivity” in which actors envision themselves engaged in a struggle of “totalities” or opposed historical forces.<sup>13</sup> Among other things, social myth serves classes engaged in revolutionary struggle by ideologically insulating its members from conversion by the dominant class. In establishing hegemony, the hegemon offers concessions to the dominated classes in order to render the hegemony more palatable.<sup>14</sup> The hegemon justifies such reforms by co-opting the ideas of the revolutionary class and transforming them (*trasformismo* in Gramsci's terms) into ideas amenable to hegemony.

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<sup>11</sup> Fry, *supra* note 6 at 311.

<sup>12</sup> Enrico Augelli & Craig Murphy, *America's Quest for Supremacy and the Third World: A Gramscian Analysis* (London: Pinter Publishers, 1988) at 128.

<sup>13</sup> Cox, *supra* note 5 at 167.

<sup>14</sup> *Ibid* at 163.

These ideas exist at one of three levels of “consciousness” within the movement towards the creation of hegemony:

- the *economico*-corporate level, which is consciousness of the needs of a particular group;
- the solidarity or class consciousness level, which is consciousness of needs of a broader economic class;
- and the hegemonic level, “which brings the interests of the leading class into harmony with those of subordinate classes and incorporates these other interests into an ideology expressed in universal terms.”<sup>15</sup>

### 1.2 International Law as Hegemony

The Gramscian perspective is a useful analytical tool for understanding and predicting the dynamics of international law. According to Cox, international institutions expand hegemony but “at the same time permit adjustments to be made by subordinate interests with a minimum of pain.”<sup>16</sup> International law, then, is a mechanism for the establishment and maintenance of hegemony. While it would be inaccurate to argue that international law never advances the interests of subordinate groups, the Gramscian perspective posits that international law is structured to incorporate these interests in a way that is minimally disruptive to hegemony. Insofar as the legal system is based on the interpretation of texts (treaties, conventions, etc.), international legal bodies are likely to synthesize potentially disruptive ideas so that they are consonant with hegemony. This process is evident in the treatment of the CHM principle at international law. While the CHM principle was advanced by NIEO nations as an *economico*-corporate challenge to the hegemony of the Global North, the structure of international law guarantees that the principle will be re-interpreted at the hegemonic level through the process of *trasformismo*.

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<sup>15</sup> *Ibid* at 168.

<sup>16</sup> *Ibid* at 172.

## 2. THE COMMON HERITAGE DOCTRINE IN SPACE LAW

The CHM doctrine has been the site of an interpretive struggle between NIEO countries and the Western Bloc. While NIEO countries sought an interpretation of CHM that conformed to their social myth, the dominant Western Bloc attempted to transform the doctrine into an idea consistent with Western hegemony. The disappearance of the NIEO as a persuasive social myth has removed all insulation from the CHM principle, rendering it vulnerable to *trasformismo*. In practical terms, the result is that future interpretation of the CHM principle is likely to accord with free-market principles.

### 2.1 Characteristics and Development

Maltese Ambassador Arvid Pardo famously articulated the concept of the “common heritage of mankind” in his 1967 speech to the General Assembly of the United Nations. On behalf of the government of Malta, Pardo argued, “The seabed and the ocean floor are a common heritage of mankind and should be used and exploited for peaceful purposes and for the exclusive benefit of mankind as a whole.”<sup>17</sup> Supporting this contention, Pardo argued that treating the seabed as *res nullius* (unclaimed territory upon which any nation may make a valid claim) would lead to a scramble to exploit the seabed’s resources, leading to “grave” consequences of global instability.<sup>18</sup> Pardo was an international federalist, but his arguments echoed the concerns of decolonizing nations in the Global South. Both the deep seabed and outer space were believed to contain untold riches that were mere years or decades from human reach, and by asserting a pseudo-beneficial ownership right over them, developing nations hoped to effect a redistribution of their benefits that would result in a sharing of wealth.<sup>19</sup>

Commentators are divided on the precise characteristics of the common heritage doctrine. Alexandre Kiss writes, “The very nature of the common

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<sup>17</sup> UNGA, 22d Sess, 1515th Mtg (1967).

<sup>18</sup> *Ibid.*

<sup>19</sup> Bradley Larschan & Bonnie C Brennan, “The Common Heritage of Mankind Principle in International Law” (1983) 21 Colum J Transnat’l L 305 at 309–310.



heritage seems to imply a form of trust under which the principal aims are rational use, good management, and transmission to future generations.”<sup>20</sup> Meanwhile, Daniel Goedhuis identifies four characteristics of the common heritage doctrine:

1. No nation may appropriate the territory.
2. The territory is managed by all nations.
3. The benefits of resource exploitation must be shared by all nations.
4. The territory must be used for peaceful purposes.<sup>21</sup>

John Noyes lists these factors and adds environmental protection.<sup>22</sup> However, as discussed in greater detail below, the legal implications of CHM can be construed broadly or narrowly.

## **2.2 The CHM Principle in Treaty Law**

### **2.2.1 The Outer Space Treaty**

Space law has its foundation in the *Treaty of Principles Governing the Activity of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies* (conventionally called the “Outer Space Treaty”). The Outer Space Treaty came into force in October 1967. It has been signed and ratified by 102 nations, including all major space powers. The treaty’s preamble “recognize[s] the common interest of all mankind in the progress of the exploration and use of outer space for peaceful purposes.”<sup>23</sup> Pursuant to this objective, the treaty provides that no territorial sovereignty may be exercised over celestial bodies, and that the use of the resources of outer space “shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development, and shall be the province of all mankind.”<sup>24</sup>

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<sup>20</sup> Alexandre Kiss, “The Common Heritage of Mankind: Utopia or Reality?” (1985) 40 Int’l J 423 at 435

<sup>21</sup> Daniel Goedhuis, “Some Recent Trends in the Interpretation and the Implementation of the Rules of International Space Law” (1981) 19 Colum J Transnat’l L 213 at 218–19.

<sup>22</sup> John E Noyes, “The Common Heritage of Mankind: Past, Present, and Future” (2012) 40 Denv J Int’l L & Pol’y 447 at 450.

<sup>23</sup> *Treaty of Principles Governing the Activity of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies*, 27 January 1967, 610 UNTS 8843.

<sup>24</sup> *Ibid* at art 1.

Although the text of the treaty captures many of the aspects of the CHM doctrine, the term “common heritage of mankind” does not appear in the text of the treaty. According to Zhao, while the terms are not interchangeable, they articulate similar principles for the exploitation of the resources of outer space. Indeed, some scholars have argued that the terms are functionally and legally equivalent.<sup>25</sup> Others have argued that the language in the Outer Space Treaty is intentionally vague and cannot be understood as incorporating the CHM principle in its later formulations into space law.<sup>26</sup> Eilene Galloway observes that, unlike the Law of the Sea treaty, “the space law plan has been to have a general treaty followed by expanding its provisions into separate treaties covering specific problem areas.”<sup>27</sup>

### 2.2.2 The Moon Treaty

One such “problem area” is the Moon (and its resources), the subject of the *Agreement Governing the Activities of States on the Moon and Other Celestial Bodies* (commonly called the “Moon Treaty”), which was adopted in 1979 and entered into force in 1984. Although the CHM doctrine is perhaps most thoroughly developed in Part XI of the Law of the Sea Treaty of 1982, the earliest articulation of CHM in its modern form comes from the of Moon Treaty.<sup>28</sup> Article 11(1) of the Moon Treaty declares that “[t]he moon and its natural resources are the common heritage of mankind.”<sup>29</sup> Like Part XI of the Law of the Sea treaty, the Moon Treaty reflects a desire on the part of NIEO nations to establish an international regime that would regulate the exploitation of resources according to the CHM principle—a challenge to the dominance of spacefaring superpowers through the mechanisms of international law.

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<sup>25</sup> Yun Zhao, “An International Space Authority: A Governance Model for a Space Commercialization Regime” (2004) 30 J Space L 277 at 278–279.

<sup>26</sup> Larschan & Brennan, *supra* note 19 at 328.

<sup>27</sup> Eilene Galloway, “Agreement Governing the Activities of States on the Moon and Other Celestial Bodies” (1980) 5 Annals Am & Space L 481 at 507.

<sup>28</sup> Kemal Baslar, *The Concept of the Common Heritage of Mankind in International Law* (The Hague: Martinus Nijhoff Publishers, 1998) at 159.

<sup>29</sup> *Agreement Governing the Activities of States on the Moon and Other Celestial Bodies*, 5 December 1979, 1363 UNTS 3, art 11 [“Moon Treaty”].

Baslar describes the Moon Treaty as

among the first contemporary international agreements through which the South raised its voice. From the perspective of developing countries “common heritage” meant common ownership and access approved by the international community on the basis of one nation-one vote.<sup>30</sup>

However, the final text of the treaty reflects the wide chasms between the parties who negotiated it. For example, Article 11(3) provides that any lunar resources “in place” cannot be the subjects of appropriation. The legal effect of this provision is ambiguous; it can be interpreted either as *prohibiting* the appropriation of resources, or as *allowing* persons or states to acquire full possessory rights over the resources, as the resources are not “in place.” The latter interpretation means that the environment itself would be *terra communis*—subject to no national appropriation—while the resources within the environment would be *res nullius* and subject to the appropriation of anyone who makes a valid claim.<sup>31</sup> In other words, once the resources are moved, the treaty ceases to protect them. This interpretation clearly advantages spacefaring powers that are able to stake an early claim to the resources.

The drafting of this provision represents a compromise between NIEO nations and the developed world. The former sought a moratorium on exploitation of lunar resources until an international authority could be established, while the latter sought a *res nullius* system.<sup>32</sup> Bradley Larschan and Bonnie Brennan argue that the NIEO nations were willing to compromise on the moratorium in order to secure agreement on establishing an international space authority, which is the subject of Article 11(5). Under this model, an internationally managed entity “would possess exclusive rights to harvest

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<sup>30</sup> Baslar, *supra* note 28 at 164.

<sup>31</sup> *Ibid* at 168–169

<sup>32</sup> Larschan & Brennan, *supra* note 19 at 329.

resources, and equitably distribute them among all states, regardless of which nations actually participated in the resource exploitation activities.”<sup>33</sup>

Ultimately, however, the Moon Treaty has not received widespread ratification from either spacefaring nations or NIEO nations. In that sense, it may be characterized as a failed treaty.<sup>34</sup> Given the Outer Space Treaty’s vagueness and the Moon Treaty’s limited acceptance, the legal effect of the CHM principle in space law is questionable.

### 3. LEGAL EFFECT OF THE CHM PRINCIPLE

The brief overview above illustrates the process of hegemony at work. The NIEO nations self-consciously strived to challenge the Cold War balance of power and to establish themselves as an alternate hegemonic power. In doing so, they framed their struggle in terms of a social myth, of which the CHM principle is one aspect.

#### 3.1 Conflicting Interpretations

##### 3.1.1 NIEO Nations

Larschan and Brennan view common heritage doctrine as the “legal equivalent” to the emergence of a New International Economic Order.<sup>35</sup> Lacking the military or technological capability to contest wealthy nations’ claims to the resources of the deep seabed, Antarctica, and outer space, states in the Global South leveraged their numerical influence at the United Nations General Assembly to enshrine the common heritage principle in international law.<sup>36</sup> In Gramscian terms, they sought to establish a counter-hegemony.

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<sup>33</sup> Harinderpal Singh Rana, “The ‘Common Heritage of Mankind’ & the Final Frontier: A Revaluation of Values Constituting the International Legal Regime for Outer Space Activities” (1994) 26 Rutgers LJ 225 at 230–231.

<sup>34</sup> Baslar, *supra* note 28 at 175–177.

<sup>35</sup> Larschan & Brennan, *supra* note 19 at 305–306.

<sup>36</sup> *Ibid* at 309–311.

According to Rana, developing nations have historically sought to interpret CHM broadly, conferring something akin to common property rights upon the thing that is the common heritage of mankind.<sup>37</sup> Interpreted broadly, the principle could permit a redistribution of the vast wealth that, according to conventional wisdom of the time, could be extracted from the seabed or from outer space. Such a redistribution was consistent with the social myth of the NIEO, whose telos was economic parity between the Global South and the North.<sup>38</sup>

Using the Gramscian framework, the NIEO nations interpreted the CHM principle at the *economico*-corporate level. In other words, they interpreted it according to the needs of their own subordinated group. Given that international law is a mechanism for the preservation of hegemony, it is unlikely that any *economico*-corporate interpretation of a legal concept can have a sustained impact at international law. Any formulation of the idea will be subject to *trasformismo* in order to become acceptable to the hegemonic bloc. In the case of the CHM principle, the disintegration of the NIEO bloc has accelerated the process of *trasformismo*.

Academic commentators have characterized the 1970s as the Golden Age of the NIEO, after which the movement gradually declined in the 1980s as severe debt crises gripped the Global South. By the end of the Cold War, much of the cohesiveness of the 1970s had disappeared.<sup>39</sup> In Gramscian terms, the alternate social myth had ceased to be relevant. As a result, CHM may be construed as an orphaned principle, one whose textual existence has outlived the ideological systems and social conditions from which it originated.

### 3.1.2 Industrialized Nations

The failure or refusal of any spacefaring power to ratify the Moon Treaty demonstrates the deep suspicion harboured by developed nations of attempts to create enforceable rights in international law on the distribution of space

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<sup>37</sup> Rana, *supra* note 33 at 230

<sup>38</sup> Ruth Gordon, "The Dawn of a New, New International Economic Order" (2009) 72:4 Law & Contemp Probs 144 at 145–148.

<sup>39</sup> *Ibid* at 131–162. See also Mark Berger, "After the Third World? History, Destiny, and the Fate of Third Worldism" (2004) 25:1 Third World Quarterly 25 at 39.

resources. Part of this suspicion can be explained by the ideological climate of the 1970s: Western powers were suspicious of any legal concept that smacked of socialism and inhibited the ability of market forces to govern the exploitation of resources.<sup>40</sup> Similarly, the Eastern Bloc was suspicious of the CHM doctrine because, while the issues of non-appropriation of lunar resources aligned with Marxist-Leninist theory, the concepts of “mankind” and “heritage” were inconsistent with the Marxist-Leninist understanding of international law.<sup>41</sup>

Industrialized nations such as the United States have tended to take a view of CHM that is in keeping with free-market principles. Commenting on the United Nations Convention on the Law of the Sea, President Clinton once asserted that it is “the consistent view of the United States that the common heritage principle fully comports with private economic activity in accordance with market principles.”<sup>42</sup> Furthermore, Anand observes that a number of Western diplomats maintain that the CHM principle is an aspirational goal with no binding legal content.<sup>43</sup> Both positions represent the process of *trasformismo* of the CHM principle to the level of hegemony. Interpreted in this manner, CHM plays second fiddle to free-market liberalism, the universalistic social myth of the dominant group.

The fate of the CHM principle in each of the space treaties illustrates a different aspect of hegemony at work. In the Outer Space Treaty, the term “common interest” is left undefined. As such, it is not threatening to the dominant group, but secures the consent of the subordinate groups that view it as at least potentially compatible with their interests. With the Moon Treaty, the dominant powers simply did not ratify it, leaving open the option to coercively develop international law by unilateral action. In either case, it is clear that spacefaring nations will not be bound by a broad interpretation of the CHM principle based on either treaty.

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<sup>40</sup> Rana, *supra* note 33 at 231–232.

<sup>41</sup> Baslar, *supra* note 28 at 163–164.

<sup>42</sup> Quoted in *ibid* at 219–220.

<sup>43</sup> RP Anand, *Studies in International Law and History: An Asian Perspective* (Lieden: Martinus Nijhoff Publishers, 2004) at 182.

### 3.2 The CHM Principle and Customary International Law

Some scholars have argued that the widespread acceptance of the Outer Space Treaty is evidence that the CHM principle exists as customary international law.<sup>44</sup> However, such a claim is dubious considering the lack of certainty as to whether the principle has legal force at all, let alone what its precise ramifications are.

#### 3.2.1 A Gramscian Perspective on the Formation of Custom

According to Fry, treaties represent the most consent-based source of international law, and general legal principles are the most coercive. Custom exists somewhere between these extremes.<sup>45</sup> Custom is comprised of consistent state practice coupled with *opinio juris*.<sup>46</sup> *Opinio juris* is an expression of state consent. The hegemonic aspects of custom become apparent when custom is enforced against a non-compliant state.

Fry refers to the North Sea Continental Shelf cases and notes that they articulate “the notion of specially affected states determining custom.”<sup>47</sup> Seafaring powers with well-developed habits of maritime activity find those habits universalized in the form of custom. Given the immense resources required for a nation or private actor to develop a space program, the process of custom-making would be highly influenced by, and presumably consonant with the interests of, spacefaring powers. Being unable to travel to space, other nations are unable to shape the formation of custom by state acts. In this way, the structure of custom formation is conducive to the establishment of hegemony.

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<sup>44</sup> Ricky J Lee, “Reconciling International Space Law with the Commercial Realities of the Twenty-first Century” (2000) 4 Sing J Int’l & Comp L 194 at 203.

<sup>45</sup> Fry, *supra* note 6 at 326.

<sup>46</sup> Hugh M Kindred, Phillip M Saunders et al, eds, *International Law: Chiefly as Interpreted and Applied in Canada*, 8th ed (Toronto: Emond Montgomery Publications, 2014) at 31.

<sup>47</sup> Fry, *supra* note 6 at 327.

### 3.2.2 The CHM Principle as Objection

Given the limited scope of extra-orbital space activity, it is doubtful that there could be much basis to find the existence of a custom. Large-scale commercial extraction of resources from celestial bodies has not occurred, nor has the militarization of such bodies. While the Outer Space Treaty received widespread ratification and may suggest state acceptance of the CHM principle in space law, this article has argued that the text of that treaty offers little in the way of substantial legal direction for space policy at the present time.

However, in the context of Cold War imperialism, it is not surprising that the spectre of full-scale militarization and commercial exploitation of space figured prominently in the minds of NIEO nations. By including the language of CHM in the treaties, developing nations sought to pre-empt such a scenario. Because of the principle's controversial nature, it may be best understood as an explicit, pre-emptive objection to the formation of customary international law that would permit the militarization and unilateral resource exploitation of space.

## CONCLUSION

Based on a Gramscian analysis, the CHM principle has had little substantial impact on space law in terms of *lex lata*. Although NIEO nations were partially successful in enshrining CHM in the text of existing space treaties, the principle is too vague in the Outer Space Treaty to have much practical impact on future space travel, and the Moon Treaty has only 16 parties, none of which are major space powers.<sup>48</sup> Similarly, it has not achieved the widespread acceptance necessary to exist in customary law. Given the dominance of space travel in the 20<sup>th</sup> century by imperialistic superpowers, any interpretation of the CHM principle would be consonant with the preservation of hegemony.

However, the changing context of the 21<sup>st</sup> century may ignite new interest in the CHM principle in terms of *lex ferenda*. In the United States, space travel is

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<sup>48</sup> "Moon Treaty," United Nations Office for Disarmament Affairs online: <[disarmament.un.org/treaties/t/moon](http://disarmament.un.org/treaties/t/moon)>.



increasingly privatized and commercialized, while China, the European Union, India, and other nations have space programs that are more active than ever before. While it is too early to make predictions about the state of Western hegemony, renewed interest in space travel by a greater number of nations and private actors is likely to bring about a rapid development in space law. If this is the case, it may well be that the CHM principle will be subject to new interpretations.